

No. 11,974

IN THE

United States Court of Appeals
For the Ninth Circuit

WALLACE RAYMOND SHAVER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

The appellee joins in the statements made in appellant's opening brief as to the jurisdiction of the District Court of the United States for the Northern District of California, Southern Division, to try this case, and the jurisdiction of this Honorable Court to consider the pending appeal from the District Court's judgment of conviction. (Appellant's Opening Brief, pp. 1 and 2.)

STATEMENT OF FACTS.

The facts in this case are undisputed. The appellant was employed as a truck driver by the Railway Ex-

press Agency, a carrier of freight and express, on the dates named in the respective counts of the indictment. (Tr. 27.) He drove a truck belonging to the Railway Express Agency in and about San Francisco; he did not drive the truck out of the State of California. (Tr. 28.) In the course of his duties he transported local, intrastate and interstate freight, making deliveries from the railroad yards to the consignees. (Tr. 28.)

On each of the two occasions mentioned in the indictment, the appellant delivered an interstate shipment of freight to the consignee and collected charges arising out of and accruing from the transportation of the freight in interstate commerce, including taxes, express charges, value charges, C.O.D. charges and C.O.D. service charges. (Tr. 30.) He embezzled these funds and converted them to his own use. (Tr. 34-35.)

ARGUMENT.

The indictment in this case is the first to be returned in this District charging a violation of U.S. Code, Title 18, §409, as amended in 1946 (60 Stats. 656).

Prior to that amendment §409 made it a criminal offense to:

1. Break the seal of a railroad car containing interstate shipments of freight or express with intent to commit larceny.
2. Enter such a car with like intent.

3. Steal, take, carry away or conceal, or by fraud or deception obtain with intent to convert to one's own use, from certain specified places, any goods moving as or which are a part of or which constitute an interstate shipment of freight or express.

4. Buy, receive or have in one's possession any such goods, knowing them to have been stolen.

5. Steal, take, carry away, or by fraud or deception obtain with intent to convert to one's own use any baggage which shall have come into the possession of any common carrier for transportation in interstate commerce.

6. Break into, steal, take, carry away, or conceal any of the contents of such baggage.

7. Buy, receive or have in one's possession any such baggage or contents, with knowledge that it was stolen.

These categories may be summarized by stating that they penalize the burglary of a railroad car, the larceny of goods moving as or comprising a part of an interstate shipment, larceny of baggage or the contents of baggage entrusted to a carrier for interstate shipment, and receiving property stolen in violation of this section.

"The essential object of this statute is to create, define, and punish the offense of abstracting or unlawfully having in possession goods

while in interstate or foreign transit, and thereby interfering with interstate or foreign commerce.”

White v. U.S., 273 Fed. 517.

By amendment in 1946, Title 18 U.S. Code § 409 was revised and expanded in several respects.

1. It was reworded to make it applicable to burglary of vessels, aircraft, wagons and motor trucks, as well as railroad cars.

2. It included embezzlement of goods moving as or which are a part of or which constitute an interstate shipment of freight or express, and added aircraft and air navigation facilities to the places from which larceny or embezzlement is prohibited.

3. It included embezzlement of baggage or contents of baggage entrusted to a carrier for interstate transportation.

4. It made it a criminal offense to “embezzle, steal, or unlawfully take by any fraudulent device, scheme, or game from any railroad car, motor truck, steamboat, vessel, aircraft, or other vehicle operated by any carrier, or from any passenger or employee thereon, when such railroad car, or the train of which it is a part, motor truck, steamboat, vessel, aircraft, or other vehicle is moving in interstate or foreign commerce any money, baggage, goods or property” with intent to convert the same to one’s own use, or to buy, receive or have in one’s possession any such money,

baggage, goods or property, knowing the same to have been embezzled or stolen.

5. It made it a criminal offense for anyone who shall "being an employee of any carrier riding in, on or upon any railroad car, motor truck, steamboat, vessel, aircraft or other vehicle of such carrier transporting passengers or property in interstate or foreign commerce and having in his custody funds arising out of or accruing from such transportation, embezzle or unlawfully convert to his own use any such funds."

It will readily be seen that in addition to enlarging the scope of the several categories of offenses denounced by the old statute, the amendment set up two entirely different classes of offenses, Federal jurisdiction over which is dependent upon totally different aspects of interstate commerce.

In the old statute, the property involved in the larceny or receiving was only such property as constituted an interstate shipment, or which was actually moving in interstate commerce.

The amended statute (Subsection (4)) makes it an offense against the United States for anyone to commit a larceny or embezzlement of *any property upon* a vehicle when that vehicle is moving in interstate or foreign commerce. The test here is not whether the *property* is part of or constitutes an interstate or foreign shipment. The test is whether the *vehicle* is moving in interstate or foreign com-

merce. Larceny upon a transcontinental train or airplane is made a Federal offense, somewhat akin to larceny upon the high seas, or upon lands within the exclusive jurisdiction of the United States. This paragraph of the amended statute applies to larceny or embezzlement of money or property which is *not* moving in interstate or foreign commerce, but which is stolen or embezzled from a vehicle which *is so moving*. It would apply, for example, to the theft of property belonging to a passenger traveling from San Francisco to Truckee, California, on a train en route from San Francisco, California to Ogden, Utah.

Subsection 5 of the amended statute, under which the indictment in this case is laid, makes it an offense to embezzle funds accruing from the interstate transportation of freight or express. The embezzlements punishable under this paragraph of Section 409 are by the terms of the statute only embezzlements committed by employees of a carrier riding upon vehicles of their employer, which vehicles are transporting passengers or property "in interstate or foreign commerce".

In his brief appellant argues that this means embezzlements of funds accruing from the interstate transportation of property which has been carried *on the vehicle* upon which the employee is riding, FROM ONE STATE TO ANOTHER.

We do not believe any such interpretation to be the intention of Congress, nor do we feel that it is a proper construction of the language of the statute.

Had Congress intended to penalize only such embezzlements, there would have been no necessity to enact this portion of the statute at all, since such embezzlements are included within the language of subdivision (4) "embezzle * * * or unlawfully take * * * from any * * * motor truck when such * * * motor truck is moving in interstate or foreign commerce, any money * * * with intent to convert the same or any part thereof to his own use".

We believe that subsection 5 of § 409 is intended to and does by its very terms penalize embezzlements by a carrier's transit employees (as opposed to office employees) who ride upon the carrier's vehicles, making deliveries of property which is or constitutes a part of an interstate shipment of freight or express.

A vehicle which makes the initial or the terminal haul is as much engaged in transporting property in interstate commerce as the vehicle which carries the property across the line from one State to another.

The shipments delivered by appellant in this case were "door to door" shipments. (Tr. 21.) From the time they left the possession of the consignor until they were delivered by appellant to the consignees they were being transported in interstate commerce. While making those deliveries and collecting the charges accruing from the interstate shipment of the goods so delivered, appellant was riding upon a vehicle of the carrier "transporting property in interstate commerce".

Property is in interstate commerce from the time it leaves the hands of the consignor until it reaches the hands of the consignee.

Boyd v. U.S. (CCA-4), 275 Fed. 16;

Friedman v. U.S. (CCA-1), 233 Fed. 429;

Sharp v. U.S. (CCA-5), 280 Fed. 86.

Argument is made in appellant's brief that if the statute means what appellee contends it does mean, then we must conclude that the jurisdiction of the United States to regulate commerce between the States extends to regulation of every vehicle upon which a package constituting a part of an interstate shipment might be carried. We do not believe any such conclusion follows from our argument in this case.

Appellant concedes that the shipments delivered by him comprised interstate shipments until delivered to the consignees. It is likewise undisputed that the funds embezzled by appellant accrued from interstate transportation of the property; but the argument is advanced that at the moment the embezzlement in each instance took place, there was no interstate shipment remaining undelivered on the appellant's truck, and therefore he could not have been riding upon a truck transporting property in interstate commerce, and therefore the embezzlements are not covered by the statute.

We think this argument is without merit. From a reading of the amended statute in its entirety it seems

obvious that in enacting Subdivision 5, Congress intended to penalize exactly the thing which was done by appellant in this case, namely, the embezzlement of funds accruing from interstate transportation of property by the employees of carriers who have collected the funds after making delivery of the property. In the ordinary course of events, the charges would not accrue until the transportation had been completed, and the funds would not be collected until the delivery had been made.

The regulation of interstate commerce is within the power of Congress; and this has been held to include the power to fix rates and charges for transportation of property. In like manner, Congress has power to provide penalties for interference with interstate commerce, including such activities as larceny and embezzlement of property moving in interstate commerce or comprising interstate shipments of freight or express. It seems to us that Congress may also make it a criminal offense for employees of carriers engaged in interstate commerce to embezzle the funds accruing from interstate shipments and that the statute involved in this case was intended to and does have that effect, and that the argument that the vehicle must proceed across a State line, or that at the time of the embezzlement there must remain on the vehicle another undelivered interstate shipment is without merit.

CONCLUSION.

For the reasons stated we respectfully submit that the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
January 7, 1949.

Respectfully submitted,

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